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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 773

JACK ESCOE,

Petitioner,

vs.

FRED G. ZERBST, Warden of the United States Penitentiary at Leavenworth, Kansas.

SUPPLEMENTAL BRIEF FOR PETITIONER.

The following memorandum, supplemental to the Brief included with the original Petition, is submitted on behalf of petitioner:

I.

Does the revocation of petitioner's probation present here a question of discretion in the District Court, or a question as to the jurisdiction of such court to make the order of revocation?

Regardless of the propriety of review here, it seems reasonably clear that the trial court erred in not bringing petitioner before the Court for hearing, before making any order of revocation.

The authorities heretofore cited by petitioner support this conclusion. Others might be cited, to the same effect. We have found no Federal case where any different rule was approved. In all cases, hearings were duly had. The case of *Burns* v. *United States* (287 U. S. 216), is not opposed, as a hearing before revocation was had in that case. The Circuit Court of Appeals below expressed its approval of such right in petitioner, but then held that the law did not require the *presence* of the petitioner at such hearing.

That the statute itself required the *production* of the petitioner *before the trial court*, seems clear.

The original Act (43 Stat. 1260) specifically so provided, stating "thereupon such probationer shall *forthwith* be taken before the Court." (Italics ours.) The amendment in the Act of June 16, 1933, did not eliminate the quoted provision. Such amendment (48 Stat. 256) states "that the *first* sentence of the *second* paragraph of Section 2 of the Act of March 4, 1925 is amended to read as follows:"

The *first* paragraph of the Act of March 4, 1925, ends with the word "advisable."

The *first* sentence of the *second* paragraph, referred to in the amendment, begins with the word "at" and ends with the word "arrest." (See pages 12-13-Petition.) This is the sentence for which the amendment in the Act of June 16, 1933, must be substituted.

The remainder of the Act therefore remains unchanged, and as unchanged, retains the requirement which is the *second* sentence of such *second* paragraph, specifically providing, that, after the issuance of the warrant and the arrest of the probationer, "thereupon such probationer shall be *forthwith* taken before the court." The court below apparently recognizing this situation, noted the statutory requirement above quoted, but stated that, notwithstanding

the language of the statute, the *presence* of the probationer before the court on such a hearing was legally unnecessary. In other words, the court below approved the proposition that the "forthwith" appearance of the probationer before the court, as provided in the statute, might be dispensed with through an *ex parte* hearing before the court *in the absence of probationer!* Save the decision below, such a proposition is utterly without support in either the federal or State authorities.

We therefore conclude that not only are the decisions generally in support of the right to a hearing before revocation of parole or probation, but that the controlling federal statute here applicable specifically grants such right.

The question thus is presented, whether the denial of such right partakes of the *discretion* of the trial court, or whether a hearing is a *jurisdictional prerequisite* to action by the court in revocation of the existing suspension of sentence.

Petitioner here asserts that the question is one of jurisdiction and not of discretion. It is true that this Court in the *Burns* case stated that probation was a privilege, and not a right, yet the Court, in effect, affirms the right of the probationer, once the privilege has been granted, "to possess such privilege." Thus lawfully *possessing* it, may it be arbitrarily withdrawn from the possessor, in disregard of the specific language of the statute, which statute is the source of the court's power?

The possession of this privilege involves the essential reformative basis for the passage of the law as pointed out by this Court in *Murray v. United States*, 275 U. S. 347. It is the basis for the hope of probationer to attain self rehabilitation. His status as a prisoner on probation is essentially difficult. He is subjected to the fear, apprehension, suspicion and hostility of many of the public. He is especially subject to erroneous and mistaken suspicion. He

is in possession of a privilege which Congress authorized the court to grant, in order as this Court has said to "pluck a brand from the burning." Its withdrawal evidences the complete elimination, so far as probationer is concerned, of any benefit resulting from the Act of Congress. It is therefore of supreme importance even greater than the original privilege of probation, that such a person once having been given liberty, and a new chance, to be given an opportunity to show the propriety of his retention of this supremely valuable privilege, in accord with the specific direction of the statute.

We submit, therefore, that the duty of the trial court to obey the statute and bring the probationer before him "*forthwith*", may not be considered a matter of discretion, but, instead, constitutes a *jurisdictional prerequisite* to the withdrawal of the privilege, which privilege, under the law, the court has deliberately placed in the possession of probationer.

II.

Habeas corpus is an appropriate remedy where jurisdiction is questioned, and has been commonly used in cases analogous to the case at bar.

Thus the question here is one of *jurisdiction*, not one of *discretion*. Being a question of jurisdiction, *habeas corpus* will lie, because, while the court may have had jurisdiction of the subject matter, and of the person, it still must have had jurisdiction to do the act which deprived the defendant of liberty. This jurisdiction must come from the power granted in the statute, and should not be held to exist in event of non-compliance with the statute.

Failure of jurisdiction in this regard, prevents the act of the court in taking away the liberty of the probationer, from constituting due process of law under the Fifth Amendment.

Under such circumstances *habeas corpus* is, under the authorities, an appropriate and usual remedy.

12 R. C. L. 1244.

Church on Habeas Corpus (2nd Ed.) 458-458 (c).

State v. *Stair*, 185 N. W. 301 (N. D.).

Ex parte Albori, 21 Pac. (2d) 423 (1933) (Calif.).

In re Ridley, 300 Pac. 549 (Okla.).

People v. *Hunt*, 270 N. Y. S. 248 (1934).

Re Knowlton, 68 Pac. 480 (Calif.).

Ex parte Urbanowicz, 24 F. (2d) 574 D. C. (Kan.).

(See cases cited brief, original petition.)

Analogy may be found in the approved use of *habeas corpus*, in cases involving hearings in immigration cases.

Chin Yow v. *U. S.*, 28 Sup. Ct. Rep. 201.

Ng Fung Ho v. *White*, 259 U. S. 276.

III.

The court below therefore, we submit, erred in holding that the refusal to bring petitioner before the court before revoking probation, was in the *sound discretion* of the trial court, and in further holding that the record before the court presented *only* a question of abuse of discretion, not reviewable on *habeas corpus*. *Burns* v. *United States*, though quoted, is no authority for such a conclusion. Such case presented only questions as to procedure on an actual hearing before revocation, not the complete failure to comply with the express mandate of the statute.

This Court said in the *Burns* case, "while probation is a matter of grace, the probationer is entitled to fair treatment and is not to be made the victim of whim or caprice—There is, properly speaking, no question here of notice. Defendant was brought before the court and questioned."

IV.

What the trial court did, concerning the report of the Probation Officer, without notice to, and in the absence of, probationer, cannot be held a compliance with the statute. Petitioner endeavored, by motion, to secure a hearing but his attempt was ignored. (Pet. 11.) Nor can the fact that evidence concerning the reasons for *originally* revoking probation, may have been taken on the *habeas corpus* hearing, suffice to excuse the admitted original want of hearing required under the law. Hence the absence of a bill of exceptions, containing the evidence in the *habeas corpus* proceeding, may not here serve to support the judgment below. It being conceded that petitioner was not given a hearing prior to the revocation of his probation, the absence of the evidence taken in the *habeas corpus* proceeding becomes immaterial.

It would seem to follow, that, until probationer is granted the hearing to which, under the law he seems entitled, his present imprisonment is illegal, and the order of the District court, and the commitment thereunder, is not due process of law, and that this Court may extend suitable relief in a *habeas corpus* proceeding.

SETH W. RICHARDSON,
Washington, D. C.,
On behalf of Petitioner.